(1) Supreme Court, U.S.
FILED

NO. 01-970 DEC 27 2001

In The

Supreme Court of the United States

VICTOR J. BIEGANOWSKI,
Petitioner

vs.

THE UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in concluding that the Government did not have an unconstitutional motive in declining to move for a downward departure after the Petitioner cooperated?

LIST OF PARTIES

Victor J. Bieganowski, Defendant/Appellant/Petitioner was represented below and in this petition by John D. Nation, 2650 KPMG Tower, 717 N. Harwood, LB 126, Dallas, Texas 75201.

The United States of America was represented on appeal by Hon.Joseph Gay, Assistant U.S. Attorney, 501 NW Loop 410, Suite 600, San Antonio, Texas 78215-5597.

The case was heard before Hon. David Briones, United States District Court for the Western District of Texas, El Paso Division.

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CITATIONS TO THE ORIGINAL REPORTS

United States v. Victor J. Bieganowski, No. 00-50859 (5th Cir. September 26, 2001), from which certiorari is taken, is not published in the official reporter. It is, however, attached to this petition in the appendix.

STATEMENT OF JURISDICTION

The Fifth Circuit entered its original opinion affirming the conviction on August 23, 2001. Petitioner timely filed his motion for rehearing on September 5, 2001. The Fifth Circuit overruled the motion for rehearing on September 28, 2001.

This petition is timely filed within ninety days of this judgment. The basis for jurisdiction is 28 U.S.C.§ 1254 (1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part:

[N]or be deprived of life, liberty or property without due process of law.

STATEMENT OF THE CASE

In cause no. EP-98-CR-959-2, pending in the United States District Court for the Western District of Texas, El Paso Division, the Hon. David Briones, Judge Presiding, Petitioner pleaded guilty to an indictment charging him with conspiracy to commit mail fraud. Part of his plea agreement with the Government provided that with proper cooperation, the Government would file a motion for downward departure under Section 5K1.1 of the Sentencing Guidelines.

Prior to sentencing, the Government notified Petitioner's counsel that it did not intend to file a motion for downward departure, contending that Petitioner had failed to inform the local United States Attorney of his cooperation in another case in the Southern District of Texas, and this investigation called for Petitioner to commit criminal conduct, in violation of the terms of his pretrial release.

Petitioner filed a motion to enforce the plea bargain, arguing that the local attorney was well aware of his cooperation in the Southern District and that the Government's refusal to file a motion for downward departure was fueled by an unconstitutional motive.

At sentencing the trial court conducted a hearing on the Petitioner's motion. The Government contended that Petitioner had not been truthful in two respects: a matter of whether Petitioner, an attorney, was paying someone to solicit cases from him and the Southern District investigation and his

involvement in the Southern District investigation.

Gary Weiser, Petitioner's trial counsel, testified that the Government had known about the solicitation matter well before entry of the plea and, in fact, had been the subject of discussions with the Government. Weiser testified that the Assistant U.S. Attorney, Ms. Debra Kanoff, knew about the Southern District investigation, and Petitioner's role in it, and commented only that cooperation in the other case would not benefit him in the present case. Petitioner debriefed with the Government on more than one occasion prior to entry of the plea. After the plea, the Government never scheduled another debriefing session.

According to Mr. Weiser, on July 6, 2000, he met with Ms. Kanoff and she told him she would not be opposed to a four level downward departure; she would object only if the trial court were to consider probation. On July 27, 2000, an assistant United States Attorney for the Southern District sent a

letter to Ms. Kanoff advising her of Petitioner's cooperation. This Mr. Weiser considered tantamount to a 5K1.1 request. The next day, July 28, 2000, Ms. Kanoff filed her notice of intention not to file a 5K1.1 motion .

The FBI agent assigned to the Southern District investigation, testified that Petitioner had given substantial assistance to her investigation, and that he did so expecting a benefit in his Western District case.

The trial court held that the Government did not breach the plea agreement and proceeded to sentence Petitioner to 30 months imprisonment. The trial court reached this figure by a "5K2.0" departure due to Petitioner placing himself and his family at risk in the other investigation and his expenditure of substantial personal funds in that matter.

The Government did not appeal the trial court's 5K2.2 departure. Petitioner appealed to the Fifth Circuit, which court affirmed the sentencing.

REASONS FOR ALLOWING THE WRIT

Petitioner's due process rights were violated in that although he proved that the Government had no possibly legitimate grounds for treating him in a discriminatory manner by not filing a motion for downward departure even though Petitioner had cooperated fully.

This Court has stated that the prosecutor's exercise of the discretion to file a motion for downward departure is subject only to constitutional restraints, and therefore a federal district court's authority to review the refusal to file is limited to determining whether the refusal was animated by an unconstitutional motive. *Wade v. United States*, 504 U.S. 181, 185 (1992).

Nevertheless, a defendant is entitled to relief if he can show that the Government's refusal to file the motion is not rationally related to any government end. *Wade*, 504 U.S. 186.

He can show this by proving that the Government has no possibly legitimate grounds for treating him in a discriminatory manner. *United States v. Urbani*, 967 F.2d 106, 110 (5th Cir. 1992).

Although the Government does possess the discretion not to file a 5K1.1 motion, that discretion is not unlimited. *United States v. Brechner*, 99 F.3d 96, 99 (2d Cir. 1996). There is an implied obligation of good faith and fair dealing in every cooperation agreement, and the trial court may properly inquire into whether the government has lived up to its end of the bargain. *United States v. Fernandez*, 127 F.3d 277, 285-286 (2d Cir. 1997). A presumption of fairness underlies agreements between the defendant and a prosecutor, so that when a prosecutor makes a promise and obtains in return cooperation from a defendant, that promise must be kept. *United States v. Khan*, 920 F.2d 1100, 1105 (2d Cir. 1990).

The scope of the Government's discretion does not permit it to ignore or renege on contractual agreements. *United*

States v. Rexach, 896 F.2d 710, 714 (2d Cir. 1990). Nor may the government ignore information provided by the defendant simply because it is information the government does not want to hear. *Khan*, 920 F.2d 1105.

The government may not rely on pre-agreement matters to refuse to move for departure; it would be unfair and fraudulent for the government to induce a defendant's promise that it already knew it was not going to keep. *United States v. Knights*, 968 F.2d 1483, 1488 (2d Cir. 1992).

Petitioner cooperated fully with the government, and it appeared that the government had no possibly legitimate grounds for denying him the downward departure motion. Petitioner submits that he is not required to identify the government's unconstitutional motive for failure to file, as long as he can prove circumstantially that such a motive must exist, given the government's conduct in the case.

The Fifth Circuit misperceived the argument when it held that Petitioner did not contend that the government's

motive in failing to file was animated by an unconstitutional motive, but instead contended that the government never intended to file the motion and its reasons therefore were insubstantial. *United States v. Bieganowski*, No. 00-50859 (5th Cir. August 23, 2001). Petitioner did contend that he had established an unconstitutional motive through circumstantial evidence and was thus entitled to relief.

CONCLUSION

WHEREFORE, Petitioner prays that his petition for writ of certiorari be granted.

Respectfully submitted,

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COUNSEL OF RECORD

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 00-50859
Conference Calendar

UNITED STATES OF AMERICA,

Petitioner—Appellee

v.

VICTOR J. BIEGANOWSKI,

Respondent—Appellant

Appeal from the United States District Court for the
Western District of Texas
USDC No. EP-98-CR-959-2

Before KING, Chief Judge, and POLITZ, and PARKER, Circuit Judges.

PER CURIAM:[1]

Victor J. Bieganowski pleaded guilty to an indictment

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[1] Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

Charging him with conspiring to commit mail fraud. Bieganowski has appealed, arguing that the Government breached the plea bargain by refusing to move for a downward departure pursuant to U.S.S.G. § 5K1.1. Because the Government retained sole discretion, its refusal to move for a downward departure is reviewable for an unconstitutional motive only. See Wade v. United States, 504 U.S. 181, 185-186 (1992).

Bieganowski does not contend that the Government's refusal to move for a downward departure was based upon an unconstitutional motive. Instead, Bieganowski argues that the record shows that the Government never intended to move for a downward departure and that its reasons for refusing to offer the motion were insubstantial. These issues are not reviewable. See United States v. Urbani, 967 F.2d 106, 110 (5th Cir. 1992). The judgment is AFFIRMED.

App. 3

JUDGMENT ISSUED AS MANDATE

(could not obtain from District Court)

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 00-50859
Conference Calendar

UNITED STATES OF AMERICA,
Petitioner—Appellee

v.

VICTOR J. BIEGANOWSKI,
Respondent—Appellant

Appeal from the United States District Court for the
Western District of Texas
USDC No. EP-98-CR-959-2

ON PETITION FOR REHEARING

Before KING, Circuit Judge, POLITZ and PARKER, Circuit Judges.

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/S/

_____

United States Circuit Judge